SUPREME COURT OF THE UNITED STATES.

No. ~~98~~. 28.

BANK OF THE UNITED STATES, PLAINTIFF IN ERROR,

VERSUS

HERBERT G. WAGGENER, GEORGE WAGLEY, AND ALEXANDER MILLER.

IN ERROR TO THE CIRCUIT COURT UNITED STATES FOR THE KENTUCKY DISTRICT.

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Pleas before the Honorable John McLean, one of the jugdes of the seventh circuit court of the United States of America in and for the Kentucky district, holden at the capitol, in Frankfort, on the thirteenth day of May, in the year one thousand eight hundred and thirty-three.

Be it remembered that, heretofore, to wit, on the sixth day of September, in the year one thousand eight hundred and twenty five, came the Presi-

dent, Directors, and Company of the Bank of the United States, by their counsel, into the clerk's office of the court aforesaid, and filed the following declaration, to wit:

THE UNITED STATES OF AMERICA, *ss.*—*Seventh Circuit Kentucky District.*

Declaration. The President, Directors, and Company of the Bank of the United States complain of William Owens, Herbert G. Waggener, and George Wagley, and Alexander Miller, in custody, &c., of a plea that they render unto said plaintiffs the sum of five thousand dollars, which to them they owe, and from them unjustly detain: for that, whereas, at the district aforesaid, on the seventh day of February, one thousand eight hundred and twenty-two, the said defendants, by their certain promissory note in writing, signed with their hands and names, and now here to the court shown, the date whereof is the same day and year aforesaid, promised on or before the seventh day of February, one thousand eight hundred and twenty-five, to pay to the President, Directors, and Company of the Bank of the United States, or order, five thousand dollars, without defalcation, negotiable and payable at the office of discount and deposite of the Bank of the United States at Lexington, with interest at the rate of six per centum per annum from the date of the said note.

Nevertheless, the said defendants, or either of them, on or before the seventh day of February, one thousand eight hundred and twenty-five, to pay said plaintiffs, or order, said sum of five thousand dollars, without defalcation, at the office of discount and deposite of the Bank of the United States at Lexington, have not, but to pay the same with interest at the rate of six per cent. per annum, thereon from the date of the said note, have not, but have failed and refused, although often requested so to do, and still do refuse, to the plaintiff's damage $5,000.

WICKLIFFE, *Attorney for the Plaintiffs.*

The following is a copy of the note declared on:

Note. On or before the seventh day of February, one thousand eight hundred and twenty-five, we, William Owens, Alexander Miller, Herbert G. Waggener, George Wagley, jointly and severally, promise to pay to the President, Directors, and Company of the Bank of the United States, at their office of discount and deposite at Lexington, the sum of five thousand dollars in lawful money of the United States, with interest thereon, in like money, after the rate of six per cent. per annum from this day until paid, for value received at the said office of discount and deposite at Lexington, without defalcation. Witness our hands, this seventh day of February, 1822.

WM. OWENS.
ALEX. MILLER.
ROBERT G. WAGGENER.
GEORGE WAGLEY.

Witness:
JNO. BREEN.

On which note there is the following endorsement:

Memo.—Interest is to be charged on this note from the twenty-first day of May, 1822, only, and not from the 7th of February, 1822, within mentioned, the former being the day on which the amount was actually received by the makers of the note. H. CLAY.

The following is the copy of the writ issued herein:

The United States of America to the Marshal of the Kentucky District, greeting:

[SEAL.] You are hereby commanded to take William Owens, Herbert G. Waggener, George Wagley, and Alexander Miller, if they be found within your bailwick, and them safely keep, so that you have their bodies before the judges of our seventh circuit court of the United States of America in and for the district of Kentucky, at the capitol in Frankfort, on the first Monday in November next, to answer the President, Directors, and Company of the Bank of the United States, of a plea of debt for five thousand dollars, damage five thousand dollars, and have then there this writ. In testimony whereof, John Marshall, esq., Chief Justice of the Supreme Court of the United States of America, hath caused the seal of our said court to be hereunto affixed this sixth day of September, A. D. one thousand eight hundred and twenty-five, and in fiftieth year of our independence.

Writ.

Attest: JNO. H. HANNA, *C. C. C. K. D.*

Memorandum.—This is an action of debt, and bail is required.

WICKLIFFE, *P. Q.*

Marshal's return executed 26th September, 1825, on Herbert G. Waggener and Alexander Miller, and Joseph Loring taken as their special bail.

Marshal's return.

NEWTON LOUGHERY, *D. for*
C. COLEMAN *M. D. K.*

Executed 19th day of October, 1825, on William Owens and George Wagley. Joseph Loving and R. H. Burton taken as special bail.

JNO. METTON, *M. D., for*
C. COLEMAN, *M. D. K.*

I, Joseph Loving, do hereby acknowledge myself special bail for the within named Herbert G. Waggener, in the suit named in the within writ. Witness my hand, the 26th day of September, 1825.

JOSEPH LOVING.

I, Joseph Loving, do hereby acknowledge myself special bail for the within named Alexander Miller in the suit named in the within writ. Witness my hand, the 26th day of September, 1825.

Bail piece.

JOSEPH LOVING.

I, Joseph Loving, do hereby acknowledge myself special bail for the within named William Owens in the suit named in the within writ. Witness my hand, the 19th day of October, 1825.

JOSEPH LOVING.

I, Robert Burton, do hereby acknowledge myself special bail for the within named George Wagley in the suit named in the within writ. Witness my hand, the 19th day of October, 1825.

ROBERT H. BURTON.

And afterwards, to wit, at rules held in the clerk's office of the court aforesaid, in the month of March, in the year 1826, until which time this cause was continued, came the plaintiffs by their attorney, and gave the defendants a rule to plead herein.

Rule to plead.

Judgment by nil dicit, and writ of inquiry.

And afterwards, to wit, at rules held as aforesaid, in the month of April, and year aforesaid, came again the plaintiffs, by their attorney, and the defendants still failing to plead to the plaintiff's action, it is ruled that they recover of the defendants the debt in the declaration mentioned, and such damages as they have sustained in the premises; but because it is not known what those damages are, it is commanded that the marshal cause to come at the next term twelve good and lawful men to inquire of, &c., who neither are, &c.

Order to produce papers.

And afterwards, to wit, at the May term of the court aforesaid, in the year 1833, until which time this cause was continued, the following order was made. "On the motion of the defendants, it is ordered that the plaintiffs produce and file in this cause, before the trial, a full and true copy of every minute memorandum or entry appearing on their books or records, and of all the correspondence between the parties touching or concerning the note sued on, or any proceedings relating to the same, or that the plaintiffs, if they prefer it, shall produce on the trial the said book or records, and the said correspondence."

And afterwards, to wit, at a subsequent day of the same term last aforesaid, came the plaintiffs, by their attorney; and it appearing to the court that the capias herein has been duly served on the defendant, William Owens, and he failing to appear, though solemnly called, came not.

Judgment vs. Owens.

It is therefore considered by the court, that the plaintiffs recover of the defendant, William Owens, the debt in the declaration mentioned, being five thousand dollars, with interest thereon at the rate of six per centum per annum from the 21st day of May, 1822, till paid; and, also, their costs herein expended, and the defendant, in mercy, &c.

Former pleas withdrawn.

Whereupon, came the other defendants by their attorney; and, by agreement with the plaintiff's attorney, all the pleadings heretofore entered are withdrawn.

Plea.

And the said Herbert G. Waggener, George Wagley, and Alexander Miller, defend the wrong and injury, when, &c.; and say that said President, Directors, and Company of the Bank of the United States ought not to have and maintain their action aforesaid against them, because they say they did well and truly pay to the said plaintiffs the said sum of five thousand dollars on the day the same fell due, to wit, on the day of at the district aforesaid, together with all the interest then accrued and due thereon; and this they are ready to verify: wherefore, &c.

BUCKNER, CRITTENDEN, & MONROE,
For defendants.

And the plaintiffs, for replication say that the said defendants have not paid the debt in the declaration mentioned, as in pleading they have alleged, and this they pray may be inquired of by the country; and the defendants likewise, and the parties agree that, under the issue upon the above plea, either party may give in evidence any special matter that could be specially pleaded.

Jury.

And thereupon came a jury, to wit, Littleberry Batcheller, John D. McClure, A. C. Keenon, A. R. Lindsey, Samuel B. Crockett, William R. Crockett, John R. Russell, Hugh Roseberry, William M. Davis Ben. Edrington, Edward Jones, and Henry D. Smith, who were elected, tried, and sworn, well and truly to try the issue joined; but

there not being time to go through the cause, the jury is adjourned until to-morrow morning, 9 o'clock.

Order filing papers.

And upon which day came the parties aforesaid by their attorneys, and previous to the commencement of the trial herein, the following order was directed, and is now entered, to wit: "On motion of the defendants, and in pursuance of the order made herein on the plaintiffs, to produce before the trial of this cause, (it being proved that a copy of the order was duly served on the cashier,) a copy of certain minutes or memorandums touching the loan made to the defendants." The plaintiffs have this day, in obedience to said order, filed the following papers and extracts, to wit: An extract from the minutes marked No. 1; a letter from L. Cheves, president Bank United States, to J. Harper, cashier, Lexington, dated 27th March, 1822, marked No. 2; also, extract from the minutes of the bank in hand-writing of J. Harper, marked, No. 3; a letter from Wm. Owens to T. B. Monroe, dated 3d August, 1829, marked No. 4; a letter from T. B. Monroe to John Tilford, dated August 13, 1829, marked No. 5; a letter from William Owens to John Tilford, dated 15th August, 1829, marked No. 6; a letter from William Owens to Charles Wilkins, dated February 23d, 1825, marked No 7.

And the jury sworn in this cause appeared agreeably to adjournment, and returned into court the following verdict: "We of the jury find for the defendants."

Verdict and judgment for defendant.

It is therefore considered by the court that the defendants go hence, and recover of the plaintiffs their costs herein expended.

Bill exception.

On the trial of this cause, the following bill of exceptions was tendered to the court, and ordered to be entered of the record, to wit:

Be it remembered that, on the trial of this cause, the plaintiffs read to the jury the obligation declared upon as follows: (see it on page 2.)

The defendants read to the jury the endorsement on the obligations declared upon and read by the plaintiffs, fixing the period from which the interest was to be calculated; and, also, the deed of mortgage executed by William Owens to secure the plaintiffs the payment of the debt in controversy, with the endorsement thereon, fixing the time from which the interest was to be calculated. (Here insert said papers.) The defendants then introduced, as a witness, the Honorable H. Clay, who stated, in substance, that he was the attorney for the plaintiffs, in the States of Kentucky and Ohio at the date of the endorsement on the said mortgage and obligation, and had been for some time before. That some time before said date, the said Owens applied to him to exercise his influence with the president and directors of the office of the plaintiffs at Lexington, in aiding said Owens in obtaining an accommodation from the bank; that the said Owens seemed to be very solicitous to obtain the accommodation; represented he was in great need of it; that his sureties, the other obligors in the note or bond sued on, were good; that he was willing to receive the accommodation in notes of the Bank of Kentucky, of which it was understood the plaintiffs had a considerable amount on hand at their said office; and said, as witness believed, that such paper would answer his purposes as well as gold or silver. Witness understood, he believed, from the said Owens at this time, that he had before made one or more unsuccessful applications for the accommodation. The witness supposed the said Owens calculated that, as witness was the counsel of the bank, and the directors were his neighbors, that he might have some influence with them.

And the witness did accordingly speak to some of the directors of the office at Lexington on the behalf of Owens; that he was afterwards informed by them that they doubted their powers to grant such an accommodation, and had referred the matter to the directory of the parent bank. And the witness afterwards wrote a letter to the president of the principal bank, after which, he understood, the mother bank had given the directors of the office at Lexington, authority to make the arrangement; and he understood the proposal of Owens was accepted by the board of directors at Lexington. That said Owens was to have the accommodation upon personal and real security, and receive the amount in notes of the Bank of Kentucky at their nominal amounts. Witness had written the mortgage for Owens to execute and have recorded; and, being afterwards in Frankfort, the officers of the office of the plaintiffs at Lexington sent to him at Frankfort eleven hundred dollars of notes of the Bank of Kentucky, and a check on the said bank for three thousand nine hundred dollars, payable to his order, to be delivered to the said Owens upon the witness being satisfied with the mortgage. And the witness did then, at the date of the endorsements on the mortgage and obligation, hand over to the said Owens, in Frankfort, the said notes and check on the Bank of Kentucky, and make and sign said endorsements; and afterwards returned the mortgage and obligation to the office of the plaintiffs at Lexington.

Witness stated that said Owens applied to Col. James Morrison, formerly president of the office at Lexington, also to aid him in obtaining said accommodation. This was about the time of the application of Owens to the witness, and Col. Morrison did interest himself, and wrote also, witness thinks, to the president of the principal bank at Philadelphia, about the time witness wrote. Witness stated that the Bank of Kentucky had been for many years an institution of high credit; that she suspended specie payment during the war, but afterwards resumed payment, and continued in good credit until the Legislature commenced interfering in its affairs, and, during the time she continued in good credit, the office of the Bank of the United States in Kentucky received her notes in the ordinary course of business as cash; but afterwards, and some years before the application of Owens for the said accommodation, the said bank suspended specie payments, and the notes of the said bank had, in consequence, fallen considerably below par, and were currently passed and circulated at a considerable discount. He could not remember what was the rate of depreciation at the time of this transaction; but the said notes were, at one time, at a discount of fifty per cent.; that the depreciation of said notes, and the rates of discount, were universally known in Kentucky, and well known to the directors and officers of the office of the plaintiffs at Lexington; and that, in consequence of the suspension of specie payments by the Bank of Kentucky, and the consequent depreciation of her paper, the Bank of the United States had refused to give credit to, or to receive said paper, as witness understood; and that the Bank of the United States had so refused and rejected the paper of the Bank of Kentucky from the time of her suspension of payment in 1819 up to this time. Witness understood, from both the said Owens and the officers of the bank from the time he was spoken to on the subject, that the negotiation was for an accommodation in notes of the Bank of Kentucky, as witness understood the matter; and the funds were sent to him at Frankfort, in order that he might see that the mortgage had been properly acknowledged and recorded before it was received, and the funds delivered over to Owens.

Mr. Clay stated, on the cross-examination of the plaintiff's counsel, that he had always believed the Bank of Kentucky was solvent and abundantly able to pay all her debts; whether able fully to reimburse the stockholders after the payment of the debts against the corporation, he could not state; but he believed that it was generally believed, at all times, that the bank would be able to satisfy all her other debts; that the witness had declined disposing of such of the notes on the said bank as fell into his hands at a discount, but brought a suit against the bank, upon which he compromised with the bank, and received in payment the notes of individuals payable to the bank assigned over to the witness, upon which he collected lawful money. Mr. Clay stated that it was the practice of the bank, in all her regular accommodation transactions, to require notes payable at 60 or 120 days, on which the bank took the discount in advance, and required the notes to be renewed from time to time, and the discount paid. And witness stated that he had understood one or more suits had been brought against the bank, and lawful money recovered; he believed, at the time the accommodation was granted to Owens, that the repayment of the money was amply secured by the obligation and mortgage.

William S. Waller introduced as a witness by the defendants, stated that he had been appointed cashier of the Bank of Kentucky in the year 1809, and had ever since held and exercised that office; that the said bank had suspended specie payment in the time of the last war; that it afterwards resumed payment, but afterwards, in the year 1819, again suspended payment, that the notes on the said bank constituted the common circulating medium of the State, and continued to depreciate in value until the establishment of the Bank of the Commonwealth of Kentucky in 1821; after which, the notes upon the said two banks constituted the common circulating medium of the State, all passing at the same discount, that the notes on both banks continued to depreciate, and, at the time the said Owens obtained the said accommodation from the plaintiffs, the notes of each of said banks had depreciated to the amount of between thirty-three and forty per cent., and were commonly passed, and were current as a circulating medium at that rate of depreciation. That the said Owens presented at the Bank of Kentucky, in Frankfort, the check drawn by the plaintiffs in favor of Mr. Clay, or order, for the $3,900, about the time spoken of by Mr. Clay, and the said check was then paid in notes of the said Bank of Kentucky. No other funds were demanded, and no other would have been paid except notes of the Bank of the Commonwealth, which were then at the same depreciation.

Mr. Waller stated, upon cross-examination by the plaintiff's counsel, that the Bank of Kentucky had always had sufficient effects, consisting principally of debts due to the institution, to pay all the debts against the bank not calculating the stock held by the stockholders as debts against the corporation; that the bank had been several times sued, and in all such cases, the specie had been finally paid, or other arrangements made, to the satisfaction of the creditor; that the Bank of Kentucky had received in payment of debts due to her the depreciated paper of the Bank of the Commonwealth at its nominal value, and had paid off with it at par, large amount of debts against herself; that the notes, both the Bank of Kentucky and of the Commonwealth, were by law receivable, and had accordingly always been received and passed for State taxes and county levies, at par. Witness believed that, though there was no difference in the market price of the notes on the two banks, yet many persons value those on the Bank of Kentucky the higher.

The Bank of Kentucky always preferred receiving her own paper, and passing out the notes on the Bank of the Commonwealth, and, by this means, reduced the amount of her notes in circulation. And the bank had thus, and by direct payments, discharged the greater part of her debts, and had distributed to the stockholders ten dollars in specie, and seventy dollars in notes on the Bank of the Commonwealth, upon each share of one hundred dollars. How much more the bank would be able to distribute among the stockholders, the witness could not state.

Witness further stated that, when the Bank of Kentucky suspended specie payments in 1819, the institution was considerably indebted to the plaintiffs at the office at Lexington, for her notes taken in the usual course of business, and for Government deposites transferred to that office from the Bank of Kentucky and its branches; and that the accounts had been settled between the institutions, the balance ascertained and placed to the credit of the plaintiffs on the books of the Bank of Kentucky, as a deposite upon which the Bank of Kentucky agreed, in consideration of forbearance of the plaintiffs to pay interest at the rate of six per cent per annum; and that said interest, as it accrued, was carried at stated intervals of time to the credit of the plaintiffs on the books of the bank; and that the amount paid Owens on the said check had the effect of stopping the interest on that sum for that time Mr. Waller also stated that the balance which remained due from the Bank of Kentucky to the Bank of the United States was finally settled and discharged in specie or its equivalent about seven months after the date or time of the said loan to Owens. The Bank of Kentucky did not then, nor for many years after, if ever, resume the payment of its notes or debts generally in specie, or its equivalent.

The witness stated that, at the time Owens received the payment of the said check for the three thousand nine hundred dollars in notes on the Bank of Kentucky, he owed the institution about thirteen hundred dollars; but he did not then pay said debt, but did so some time afterwards, whether with part of the money or notes he so received of the bank, witness did not know.

The defendants then read to the jury the following extracts from the books of the office of the plaintiffs at Lexington; and, also, a letter from L. Chevis the president of the Bank of the United States at Philadelphia, all produced by the said plaintiffs in obedience to the order of court made at the present.

(Here insert said extract and letter.)

The above being all the evidence given on the trial, the plaintiff's counsel move the court to instruct the jury as follows:

(Here insert plaintiff's instructions.)

The defendants counsel move the court to instruct the jury as follows:

(Here insert defendant's instructions.)

The court refused to give the instructions moved by the plaintiffs, and gave the instructions moved by the defendants.

JOHN McLEAN. [SEAL.]

The following are the papers referred to in the foregoing bill of exceptions, except the bond sued on, which has been copied on page two, with the endorsement thereon.

Mortgage.

This indenture made this 21st day of May, 1822, between William Owens, of the county of Adair, of the one part, and the President, Directors, and Company of the Bank of the United States, of the other part, witnesseth, that the said William Owens, for the purpose of se-

curing payment to the said bank of the debt hereinafter mentioned, for and in consideration of the sum of one dollar to him in hand paid before the ensealing and delivery hereof, by said President, Directors, and Company, the recept whereof he doth hereby acknowledge, hath granted, bargained, and sold, and by these presents doth grant, bargain, and sell, unto the said President, Directors, and Company of the Bank of the United States, the several lots and parcels of land hereinafter mentioned, all of them situate, and being in the said county of Adair; that is to say: the farm of the said William Owens, containing one hundred and forty-four acres and three quarters of an acre, of which one hundred acres were conveyed to the said Owens by Garrett Connover, and Lydia his wife, by deed under date the 9th day of May, 1822, duly recorded in the clerk's office of Adair, in liber E, page 669, and bounded and described as in the said deeds is mentioned—twenty four and three quarter acres of which farm were conveyed to the said Owens by Daniel Trabue, by his separate deeds, the one bearing date the 12th day of January, 1815, and the other the ninth day of May, 1822, and both recorded in the said clerk's office; and the remaining acres, part of the said farm, were conveyed to the said Owens by deed executed by Wharton S. Lampton, recorded in the said office; also, lots number 26 and 27, in the town of Columbia, in the said county of Adair, conveyed to the said Owens by the trustees of the said town, by deed bearing date the 28th day of February, 1812, and recorded in the said clerk's office; also, a tract or parcel of land containing five and a half acres and thirty five poles, lying in the said county, near the said town, conveyed to the said Owens by James Walker, by deed bearing date the 10th day of April, 1819, and recorded in the said office on the 11th day of April, 1819; also, four lots in the said town known by the numbers 8, 9, 17, and 18, conveyed to the said Owens by the heirs of Charles Hays, deceased, by deed bearing date the 9th day of May, 1822, and recorded in the said office in liber E, page 667; also, another lot in the said town known by the number , being the part of said lot wherein said Owens' store house and office stand, adjoining the public square, and being thirty feet in front and twenty feet back, conveyed to him by Lewis Lampton, by deed bearing date the 8th day of May, 1822, and recorded in the said office in the book last aforesaid; also, another parcel of land containing eight acres adjoining the said town, conveyed to the said Owens by Wm. Caldwell and wife, by deed bearing date the 9th day of May, 1822, and recorded in the said office in liber E, page 670; also, another lot in the said town, conveyed to the said Owens by the trustees thereof, adjoining 26 or 7, as by the said deed will appear—with all and singular the appurtenances to the said several parcels of land and lots, or to any of them, belonging: to have and to hold the said several lots and parcels of land, with their respective appurtenances, to the said President, Directors, and Company of the Bank of the United States, and their successors, forever, in fee simple. Upon this condition, nevertheless, that whereas, on the 7th day of February last, the said William Owens, Alexander Miller, *Robert G. Waggon*, and George Wagley, did execute their joint and several promissory notes to the President, Directors, and Company of the Bank of the United States for the sum of five thousand dollars, payable on the 7th day of February, 1825, in lawful money of the United States, at the office of discount and deposite of the said bank at Lexington, with interest threon after the rate of six per centum per annum from the date. Now, if the said note shall be well and truly paid by the makers thereof, or either of them, at its

maturity, then this indenture to be void, otherwise to remain in full force. And the said William Owens doth covenant with the said President, Directors and Company, that he is seized of a good, sure, and indefeasible title in fee simple to the said several lots and parcels of land, and to each of them, and that he hath full power and authority to convey the same; and, further, that he will execute such further or other conveyance better to accomplish the object of this deed, as counsel may advise; and, further, that, in the event of non-payment of the said money, and of a resort of a court to equity to foreclose his equity of redemption, it may be decreed, and a sale effected for lawful money of the United States, without any other or greater delay than upon a credit of three months; and, further, that he will warrant and defend the several lots and parcels of land aforesaid, and premises, against the claim and demand of all and every person whatsoever, to the said President, Directors and Company, and their successors and assigns.

In testimony whereof, the said William Owens hath hereunto set his hand, and affixed his seal, the day and year first mentioned.

WM. OWENS. [SEAL.]

Sealed and delivered in presence of—
(Interlined before signed.)

Memorandum.—It is understood by the parties that there is reserved out of the deed within written one half acre out of the eight acres conveyed by W. Caldwell and wife, on the southeast end thereof; and, also, about three quarters of an acre out of the land conveyed by James Walker adjoining the said half acre, all of which is now in the possession of Benjamin McDowell, and this reservation is to have the same effect as if it were inserted in the body of the deed.

The interest upon the 5,000 dollars within mentioned is to commence from the 21st day of May, 1822, and not from the 7th February, as within stated.

WM. OWENS. [SEAL.]
H. CLAY, *Counsel for the Bank.* [SEAL.]

STATE OF KENTUCKY, *Adair county, sct.*

I, William Caldwell, clerk of the county court for the said county, do certify that, on this 13th day of June, 1822, this indenture was acknowledged before me in my office by William Owens, party thereto, to be his act and deed; and that the said indenture, and this certificate, are duly recorded in my office. Witness my hand the day aforesaid.

W. CALDWELL.

Extracts from the minutes, 28th January, 1822, at a meeting of the directors.

The application of Wm. Owings for a loan of $5,000 in Kentucky Bank notes, being considered by the board, is rejected; 16th February, 1822, a further communication from Col. William Owens, was read, requesting a loan of $5,000 in Kentucky notes, and rejected; 9th March, 1822, the further proposition of Col. Wm. Owens for a loan of $5,000 in Kentucky notes, being considered, and the board believing the security offered to be ample, but that they are restrained by instructions from making the loan requested, it is ordered that the proposal, with their opinion, be transmitted to the parent board for their decision.

Copied from the minutes, Attest:

JOS. TOWLER, *Cashier.*

BANK OF THE UNITED STATES,
27th March, 1822.

SIR: Your letter of the 9th instant has been duly received, and was yesterday laid before the board, together with the extract from the minutes of your board to the 9th instant. This board has agreed to accept the proposition of Col. William Owens, to which your letter and this extract refer, for five thousand dollars in Kentucky Bank notes. It is presumed that due attention to the value and character of the real estate to be given in mortgage, will be paid; and that they will be such as to make this a valuable part of the security, and it may be fit to insert such a clause in the mortgage as will exempt it from the operation of the laws of the State delaying and denying the rights of creditors.

Letter of L. Cheves.

I am, sir, very respectfully,
Your obedient servant,
L. CHEVES, *President.*

J. HARPER, ESQ., *Cashier off Bank U. S.*,
Lexington, Kentucky.

The plaintiffs move the court to instruct:

1. The jury that, if they believe from the evidence, that the consideration of the note sued on was $3,900 paid in check on the Bank of Kentucky, and $1,100 in Kentucky notes; and that the contract was fairly made without any intention to evade the laws against usury, but that the parties making the contract intended to exchange credits for the accommodation of Owens; that the Bank of Kentucky was solvent, and so understood to be, and able to pay all its debts by coercion; that the contract is not void for usury, nor contrary to the fundamental law or charter of the bank, notwithstanding it was known to the parties that said bank did not pay specie for its notes without coercion; and that the difference in exchange between bank notes of the Bank of Kentucky and gold and silver, was from thirty-three to forty per cent. against the notes of the Bank of Kentucky.

Plaintiff's instructions.

2. To instruct the jury that, if they believe from the evidence that the contract was made on the part of the bank fairly, and with no intention to avoid the prohibition of their charter by taking a greater rate of interest than six per cent., or the statutes against usury, but at the instance, and for the accommodation and benefit of the defendant Owings; and that, at the time of the negotiation and contract for the check on the Bank, and the $1,500 in bank notes of the bank of Kentucky, was indebted to the Bank United States, at their office aforesaid, the sum of $10,000 or more, bearing an interest of six per cent.; which sum it was understood and believed by the parties to the contract, at and before its execution, (the Bank of Kentucky, with interest, was well able to pay, and which sum did pay,) after deducting the $3,900 paid to the defendant Owings, with interest in gold or silver, or its equivalent; that the contract was not usurious unless, they believe that the contract was a shift or device entered into to avoid the statute against usury, and the prohibition of the charter, notwithstanding the jury should find that the check and notes aforesaid were, in point of fact, of less value than gold and silver.

3d. If the jury find, from the evidence in the cause, that the defendants applied to the plaintiffs to obtain from them five thousand dollars of the notes of the President, Directors, and Company of the Bank of Kentucky; and in

consideration of their delivering, or causing to be delivered to the defendants $5,000 of such notes; and the said Bank of Kentucky was then solvent and able to pay the said notes, and has so continued up to this time; and that the holders thereof could, by reasonable diligence, have recovered the amount thereof, with six per centum per annum interest thereon, from the time of the delivery of them by plaintiffs to defendants, up to the time of such recovery; and that said arrangement and contract was not made under a device, or with the intent to avade the statutes against usury, or to evade the law inhibiting the plaintiffs from receiving or reserving upon loans interest at a greater rate than six per centum per annum; then the transaction was not in law usurious or unlawful, and the jury should find for the plaintiffs.

4. That unless the jury find from the evidence in the cause that the advance sale or loan of the notes on the Bank of Kentucky, made by plaintiffs to defendants, was so made as a shift or device to avoid the statute against usury, or in avoidance of the clause of the act of Congress which inhibits the plaintiffs from taking or reserving more than at the rate of six per centum per annum for the loan, forbearance, or giving day of payment of money, the law is for the plaintiffs, and the jury would find accordingly.

5. That unless they believe, from the evidence in this cause, that there was a lending of *money*, and a reservation of a greater rate of interest than at the rate of six per centum per annum stipulated to be paid by defendants to plaintiffs, the law is for the plaintiffs, and the jury should find for them. Unless they further find that there was a shift or device resorted to by the parties with the intent and for the purpose of avoiding the law, by which something other than money was advanced, and by which a greater rate of interest than six per cent. was allowed.

6. That if the defendants applied to the plaintiffs for a loan of $5,000 of the notes of the Bank of Kentucky, and agreed to give therefor their note for $5,000, payable three years thereafter, with interest, and the Bank of Kentucky was then, and continued thereafter to be solvent, and the said Bank of Kentucky did thereafter pay and discharge to the holders thereof the said notes, the said contract was not unlawful, although the notes of the Bank of Kentucky would not then command, in gold or silver, their nominal amount when offered for sale or exchange as a commodity or money.

7. That if they find from the evidence that the defendants obtained from the plaintiffs $5,000 of the notes of the Bank of Kentucky, or $3,900 in a check upon said bank, and $1,100 of its notes, and in consideration thereof, made the note sued upon, the said transaction was not therefore unlawful or usurious, although the notes of the Bank of Kentucky were then at a depreciation in value of thirty-three per cent. in exchange for gold and silver.

8. That there is no evidence in this cause conducing to prove that there was a loan by the plaintiffs to the defendants of notes on the President, Directors, and Company of the Bank of Kentucky.

Defendants' instructions.

Defendants' instructions.

The court instruct the jury that if they find from the evidence that the only consideration for the obligation declared upon was a *loan* made by the plaintiffs to Owens of five thousand dollars in notes of the Bank of Kentucky, estimated at their nominal amounts, part paid in the notes themselves, and the residue in a check drawn by the

plaintiffs on the Bank of Kentucky, on the understanding and agreement that the said Owens was to receive the notes on said bank in payment thereof, and he accordingly did so; hat the Bank of Kentucky had, before that time, suspended specie payments, and did not then pay its notes in lawful money; that the said notes then constituted a general currency in the State of Kentucky, commonly passing in business and in exchange at a discount of between thirty and forty per cent. below their nominal amounts, and could not have been sold or passed at a higher price; that the said facts were known to the plaintiffs and said Owens: yet the plaintiffs passed the said notes to the said Owens, the borrower, at their nominal amounts, then the transaction was in violation of the act of Congress incorporating the plaintiffs, the obligation declared on is void, and the verdict ought to be for the defendants.

See Freeman vs. Brown, 7 Monroe 262.
" Bushes' case, 5 do 477.
" Roberts vs. Frenayne, 3 Croke 508.
" Boswell's case, 1 J. J. Marshall 50.
1 Bibb 333.

UNITED STATES OF AMERICA, *Seventh Circuit Kentucky District, sct.*

I, John H. Hanna, clerk of the seventh Circuit Court of the United States of Ameriaa in and for the Kentucky district, do hereby certify that the foregoing pages contain a full, true, and complete transcript of the record and proceedings in the suit aforesaid.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, this 12th day of July, A. D. 1833.

JNO. H. HANNA.

THE UNITED STATES OF AMERICA, *sct.*

The President of the United States to the Judges of the Seventh Circuit Court of the United States of America holden in and for the District of Kentucky, greeting:

Because in the record and proceedings, and also in rendering a judgment in a suit before them between the President, Directors, and Company of the Bank of the United States, plaintiffs, and Herbert G. Waggener, George Wagley, and Alexander Miller, defendants, in an action of debt, manifest error hath intervened to the great damage of the said President, Directors, and Company of the Bank of the United States, as in their complaint hath been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done the parties aforesaid in this behalf, you are commanded that if a judgment be given, then, under your seal, you distinctly and openly send the record of the proceedings in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Chief Justice of the Supreme Court of the United States, on the second Monday in January next, at the City of Washington, the present seat of the National Government, that the record and proceedings aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness, the Honorable John Marshall, esq., Chief Justice of the said Supreme Court, at the City of Washington aforesaid, this thirtieth day of May, A. D. 1833, and of our independence the 57th year.

Attest: JNO. H. HANNA, *C. C. C. K. D.*

Allowed by JOHN MCLEAN, *Justice Supreme Court U. S.*